CONSTITUTIONAL DEMOCRACY AND THE LEGITIMACY OF JUDICIAL REVIEW*

ABSTRACT. It has long been argued that the institution of judicial review is incompatible with democratic institutions. This criticism usually relies on a procedural conception of democracy, according to which democracy is essentially a form of government defined by equal political rights and majority rule. I argue that if we see democracy not just as a form of government, but more basically as a form of sovereignty, then there is a way to conceive of judicial review as a legitimate democratic institution. The conception of democracy that stems from the social contract tradition of Locke, Rousseau, Kant and Rawls, is based in an ideal of the equality, independence, and original political jurisdiction of all citizens. Certain equal basic rights, in addition to equal political rights, are a part of democratic sovereignty. In exercising their constituent power at the level of constitutional choice, free and equal persons could choose judicial review as one of the constitutional mechanisms for protecting their equal basic rights. As such, judicial review can be seen as a kind of shared precommitment by sovereign citizens to maintaining their equal status in the exercise of their political rights in ordinary legislative procedures. I discuss the conditions under which judicial review is appropriate in a constitutional democracy. This argument is contrasted with Hamilton’s traditional argument for judicial review, based in separation of powers and the nature of judicial authority. I conclude with some remarks on the consequences for constitutional interpretation.

The authority of American courts to review and declare unconstitutional popularly enacted legislation is an aspect of our constitution that strikes many as inconsistent with the idea of democracy. As H.L.A. Hart says, English political and legal thinkers find this “extraordinary judicial phenomenon” to be “particularly hard to justify in a democracy”.

1 Sidney Hook makes a similar claim: “Those who defend the

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theory of judicial supremacy cannot easily square their position with any reasonable interpretation of the theory of democracy”. These misgivings are not new; they have been expressed since our beginnings. Thomas Jefferson held judicial review to be “a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy”.

“The people themselves are the only safe depositories of government”, he said, and that implies “absolute acquiescence in the decisions of the majority — the vital principle of republics, from which there is no appeal but force”.

Throughout much of our history, judicial review has been exercised in ways that are incompatible with any reasonable interpretation of democracy. Still, I believe there is a way to conceive of democracy and the role of judicial review within it which allows it to be consistent with democratic institutions. My basic claim is that the set of moral principles and ideals that best justify democratic decision-making processes provide a justification for the institution of judicial review under appropriate circumstances. In arguing for this, I do not mean to engage in a fruitless dispute regarding the meaning of the term “democracy”. Different forms of government can be said to be democratic in one respect or another. Rather, what I aim to do is inquire into the reasons we hold equality of political rights and majority rule to be central to democratic government and society. This will provide a basis for ascertaining the institutional requirements of the democratic ideal of freedom and equality. It is with respect to these requirements that I will assess the philosophical claim that judicial review is, not simply in its practice but also by its nature, inherently undemocratic. I argue that this a priori claim is without foundation, and that under certain conditions judicial review can serve to maintain and promote the same ends that justify equal political rights and majority rule.